IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 452 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KARSAN JABARBHAI GADHAVI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 452 of 1993

MR KB ANANDJIWALA for Petitioner No. 1

MR KG SHETH, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 30/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. In this appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973, the appellant has challenged the legality of judgment dated March 6, 1993, rendered by the Learned Sessions Judge, Rajkot in Sessions Case No. 115/1992, by which he is convicted u/S. 302 of the Indian Penal Code as well as u/Ss. 37(1) and 135 of the Bombay Police Act and sentenced to imprisonment for life u/S. 302 of the Indian Penal Code as well as simple imprisonment for one month for the offence punishable u/Ss. 37(1) and 135 of the Bombay Police Act. We may state that the Ld. Sessions Judge has directed that both the sentence should run concurrently.

2. The appellant and acquitted accused Natubhai Jivabhai are the nephew and uncle. The appellant is residing at Bhomeshwar Plot, situated near Railway Station, Rajkot. In the incident in question, Kanubhai Ramjibhai lost his life. Madhuben, the wife of deceased Kanubhai Ramjibhai, is the sister-in-law of the acquitted accused. It is the prosecution case that the acquitted accused had earlier made a proposal before Kuvarben, who is mother of Madhuben to marry Madhuben with the appellant, but Madhuben had spurned the offer and thereafter Madhuben was got married to deceased Kanubhai under the provisions of the Special Marriage Act, after which regular marriage ceremonies were also performed. It is to be noted that at the time when above mentioned proposal was made by acquitted accused, the appellant was already married and was father of one child. The incident in question took place in early hours of April 6, 1992. Two days prior to the date of incident, the acquitted accused had administered threats to do away with the deceased. It is the case of the prosecution that on the date of the incident deceased Kanubhai, who was plying rickshaw on hire basis, had left his house in the early morning and at the scene of offence altercation with abuses had taken place between the deceased and the appellant, as a result of which deceased had picked up one stone and inflicted blow by the same on the head of the appellant, due to which the appellant had sustained bleeding injury. What is claimed by the prosecution is that when deceased was attempting to take another stone for inflicting another blow on the appellant, at that time the appellant had taken out knife from waist portion and inflicted blows on the neck, chest, etc. of the deceased. Because of the assault on deceased, he had fallen down, whereas the accused had left the place on his bicycle. Ashwinbhai, who is the owner of Ram Pan

House situated near Rameshwar chowk informed the father of the deceased and a complaint was lodged by Mansurbhai Devkaranbhai, who is uncle of the deceased, at the police station. The investigation of the case was made by Police Inspector Mr. Tiwari of Pradyumannagar Police Station, Rajkot. After usual investigation, the appellant and the acquitted accused were chargesheeted of the offence punishable u/Ss. 302, 120-B and 114 of the Indian Penal Code. As the offence punishable u/S. 302 of the Indian Penal Code is exclusively triable by Court of Sessions, the case was committed to the Sessions Court, Rajkot for trial, where it was numbered as Sessions Case No. 115 of 1992. The charge framed at Exh.2 was read over and explained to the appellant as well as acquitted accused, who pleaded not guilty to the same and claimed to be tried. Therefore, the prosecution had examined inall 28 witnesses to prove its case against the appellant. The prosecution had also produced documentary evidence such as complaint filed by Mansurbhai, post mortem notes prepared by Dr. Divakar Narmadashankar, injury certificate of the appellant issued by Dr. Agrawat, inquest report, different Panchnamas, etc. in support of its case against the appellant and acquitted accused. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the accused incriminating circumstances appearing against them in the prosecution evidence and recorded their further statements as required by section 313 of the Code of Criminal Procedure, 1973. In their further statements, the accused had stated that case of the prosecution against them was false, but had not examined any witness in support of their defence.

3. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that deceased Kanubhai Ramjibhai had died a homicidal death. The learned Judge placed reliance on the deposition of eye witnesses Ashwin Girjashankar Trivedi P.W.4 Exh.19, Arvind Babulal Vaza, P.W.11 Exh.28 as well as Sidabhai Dayabhai P.W. 12 Exh. 29 and held that it was proved by the prosecution that the appellant had caused murder of the deceased by inflicting knife blows on vital part of his body. The learned Judge deduced that no reliable evidence was led by the prosecution to establish that there was any criminal conspiracy between the appellant and the acquitted accused for committing murder of the deceased. In view of the above referred to conclusions, the learned Judge has by judgment dated March 6, 1993 acquitted the original accused no.2, but convicted the appellant u/S.

302 of the Indian Penal Code read with sections 37(1) and 135 of the Bombay Police Act and has imposed sentence which is referred to hereinabove, giving rise to the present appeal.

4. After referring to the entire evidence on record, Mr. K.B. Anandjiwala, learned counsel for the appellant submitted that the prosecution evidence itself establishes that before the incident had taken place, an altercation full of abuses had taken place between the appellant as well as deceased and deceased had picked up a stone and inflicted blow by the same on the head of the appellant due to which the appellant had sustained a bleeding injury and when the deceased was attempting to pick up another stone for inflicting blow on the appellant, the appellant had taken out knife from his waist portion and inflicted blows on the deceased and therefore even if the Court comes to the conclusion that the appellant had exceeded right of self defence, the appellant being in jail since April 7, 1992, the Court should alter conviction u/S. 304 Part-I or Part-II of the Indian Penal Code and sentence undergone by the appellant should be imposed on him for the same.

5. Mr. K.G. Sheth, Ld. APP pleaded that the evidence of prosecution witnesses and more particularly eye witnesses establishes that the appellant had inflicted knife blows on vital part of the person of the deceased and therefore the conviction of the appellant recorded u/S. 302 of the Indian Penal Code should be upheld by this Court.

6. We have heard the learned counsel for the parties and reappreciated the whole evidence on record. The fact that the deceased died a homicidal death is not disputed by the learned counsel for the appellant and the finding recorded by the learned Judge in this regard, which is supported by medical evidence is hereby upheld.

7. The evidence of eye witness Ashwinbhai Girjashankar Trivedi, P.W. 4 Exh.19 establishes that before the knife blows were inflicted by the appellant, an altercation with abuses had taken place between the deceased and the appellant. His evidence further shows that the deceased had picked up a stone and inflicted blow by the same on the head of the appellant, due to which the appellant had sustained a bleeding injury. The evidence of Dr. Agrawat P.W. 1 Exh.6 as well as injury certificate issued by him, which is on record of the case at Exh.7, proves beyond reasonable doubt that the appellant had sustained a bleeding injury on head. The

evidence of witness Sidabhai Dayabhai P.W. 12, Exh. 29 also makes it evident that an altercation had taken place between the deceased as well as the appellant and that the deceased after picking up a stone had inflicted blow by the same on the head of the appellant due to which the appellant had sustained a bleeding injury. What is admitted by this witness in para. 7 of his deposition is that after hitting the stone on the head of the appellant, the deceased had made an attempt to pick up another stone for inflicting blow on the appellant and at that time the appellant had taken out knife from his waist portion and inflicted blows on the neck, chest, etc. of the deceased. We may state that this is the case with which the prosecution has approached the Court and the prosecution case itself makes it evident that the right of self defence was available to the appellant. Explanation-2 to section 300 of the Indian Penal Code inter-alia provides that -

> "Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence."

The evidence of eye witnesses read with the medical evidence on record makes it evident that though right of self defence was available to the appellant, he had done, without any intention, more harm than was necessary for the purpose of such defence and therefore in our view the offence would fall under Section 304 Part-I of the Indian Penal Code. Thus, the conviction of the appellant u/S. 302 of the Indian Penal Code is liable to be substituted by one under Section 304 Part-I of the Indian Penal Code.

8. The record of the case shows that the appellant was arrested on April 7, 1992 and is in jail since then. The record does not indicate that the appellant was enlarged on bail during the trial. While admitting the appeal the High Court had refused bail to the appellant. Therefore, there is no manner of doubt that the appellant is in jail since April 7, 1992 i.e. more than 9 years. Having regard to the facts of the case, we are of the opinion that the interest of justice would be served if the appellant is sentenced to imprisonment which he has already undergone.

9. We may state that though the appellant is

convicted under Sections 37(1) and 135 of the Bombay Police Act, no charge was framed against the appellant for commission of those offences and therefore, conviction of the appellant recorded under Sections 37(1) and 135 of the Bombay Police Act is liable to be set aside.

10. For the foregoing reasons, the appeal is partly allowed. The conviction of the appellant u/S. 302 of Indian Penal Code as well as under sections 37 (1) and 135 of the Bombay Police Act is set aside. Instead the appellant is convicted u/S. 304 Part-I of the Indian Penal Code and sentenced to imprisonment which he has already undergone. As the appellant has undergone the sentence imposed on him for the offence punishable u/S. 304 Part-I of the Indian Penal Code, the authorities are directed to release the appellant from jail forthwith unless his presence is needed with reference to any other case.

The Muddamal is ordered to be disposed of in terms of the direction contained in the impugned judgment.

Office is directed to send writ to the Superintendent, Central Jail, Sabarmati, Ahmedabad immediately for compliance.

[J.M. PANCHAL, J.]

[AKSHAY H.MEHTA, J.]

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